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IN THE

Supreme Court of the United States

October Term, 1968

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No. 1112

WILLIAM LEIGHTON, a stockholder of The One William Street Fund, Inc. for himself and all stockholders of The One William Street Fund, Inc. similarly situated and for and on behalf of The One William Street Fund, Inc.,

Petitioner-Plaintiff,

v.

THE ONE WILLIAM STREET FUND, INC., LEHMAN BROTHERS, a partnership, SIMPSON THACHER & BARTLETT, a partnership, and ALLAN B. HUNTER, PAUL E. MANHEIM, PAUL MAZUR, FRANCIS C. REED *et al.*,

Respondents-Defendants.

BRIEF OF RESPONDENTS-DEFENDANTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement of the Case

This is a derivative action against a mutual fund (The One William Street Fund) of which petitioner holds only ten shares, the Fund's investment adviser and broker (Lehman Brothers), some of the Fund's attorneys (Simpson

Thacher & Bartlett) and several officers and directors or former directors of the Fund (Hunter, Manheim, Mazur and Reed). The complaint, filed in August of 1964 in the United States District Court for the Southern District of New York, appears to allege various acts, failures to act and circumstances, some real and some fancied, which petitioner evidently believes violated statutory or common-law duties of the various defendants (R.1-27). Petitioner, though not a lawyer, has appeared *pro se* throughout.

This action has had a quite complicated history, most of which is unimportant for present purposes.

At this point, petitioner seeks to review a decision of the United States Court of Appeals for the Second Circuit (Petition, pp. 31-32) which:

1. affirmed the District Court's refusal to grant petitioner-plaintiff's third application for preliminary relief which would divorce a quarter of a billion dollar mutual fund from its management and throw it into receivership;
2. dismissed as unappealable the District Court's striking of an "Amended Partial Complaint (Fifth Cause of Action)"; and
3. dismissed as unappealable the District Court's denial of leave to serve and file a supplemental complaint containing six new causes of action.*

Preliminary Injunction and Receivership. The arguments on which petitioner seeks to throw the Fund into

* The Court did not address itself to petitioner's attempt to overturn another District Court order (from which no appeal had been taken) insofar as that order had failed to declare that certain defendants were in court with "unclean hands."

receivership are difficult to follow and impossible to summarize. No substantial reason is given to support such drastic relief, the consequences of which have been described by respondents-defendants as follows:

> "* * * It would suddenly deprive a publicly held mutual fund with approximately one-quarter of a billion dollars in net assets of its investment adviser, its principal broker, and its entire staff, all of whom are paid by Lehman Brothers under the investment advisory contract. (Admittedly, the broker could probably be readily replaced.) The predictable result would be a rush by stockholders to redeem their shares, the liquidation of the Fund's assets, and the probable demise of the Fund. While this might be a source of intense personal satisfaction to the plaintiff, who owns ten shares of the Fund, having a present net asset value of approximately $162.50, it would probably be a source of considerable distress to the holders of the more than fifteen million other shares of the Fund. I respectfully submit that in this particular respect, at least, the interests of the holders of more than one-quarter of a billion dollars of shares in a continuing investment in the Fund outweigh whatever interest Mr. Leighton may have by virtue of his comparatively miniscule investment." (R.1878-79)

The District Court denied petitioner's motion:

> "* * * According to my count, this is the third time that plaintiff has applied for this or substantially the same drastic relief. * * * [P]laintiff has submitted an affidavit in support of this motion which is a rehash of the allegations of the [typically prolix and extremely difficult to understand] proposed supplemental complaint. This is woefully insufficient and does not even entitle plaintiff to an evidentiary hearing on this motion. In the absence of any colorable showing by

> plaintiff and upon consideration of the previous history of this litigation, this * * * motion of plaintiff is denied in all respects." (R.1903-04, Petition, p. 44.)

Amended Partial Complaint. In July of 1965, petitioner's original fifth cause of action was dismissed "with leave to . . . replead in concise fashion essential facts tending to support a claim purusant to . . . Section 9(a)(2) [of the Investment Company Act of 1940]." (R.603.) In February, 1968, some two and one-half years later, petitioner served an "Amended Partial Complaint" limited to the fifth cause of action.

Whatever else may be said about that amended fifth cause of action (R. 1453-75), it clearly did not "replead in concise fashion essential facts" establishing anything, and failed in any way whatever to plead a violation of Section 9(a)(2) of the Investment Company Act. On defendants' motion, it was stricken by the Court (R.1896-99, Petition, pp. 39-44).

Supplemental Complaint... On April 9, 1968, after nearly three years of discovery and numerous motions in this case, petitioner moved for leave to serve a supplemental complaint containing six new, different and all but incomprehensible causes of action (R.1765-86). Defendants opposed the motion. The District Court ruled:

> "In effect, plaintiff, from the vantage point of hindsight, complains in all the new proposed claims of certain purchases and sales of securities by or for the benefit of the Fund, with the implication that those transactions were not as profitable as they might have been. Assuming that some of the Fund's transactions did not pan out as hoped, I cannot construe plaintiff's

new allegations as coherent statements of claims cognizable by a federal court. Moreover, plaintiff's new causes of action do not appear to relate directly, as he suggests, to those of his original complaint which are still in issue. Thus, it would be an egregious burden upon the defendants to have superimposed upon this relatively old litigation some entirely new theories of recovery. This is particularly so in that, as I read them, all of the allegations in these proposed new causes of action are notably imprecise to the point of being unintelligible. In the exercise of discretion, therefore, plaintiff's application for leave to file a supplemental complaint is denied in all respects." (R. 1901-02, Petition, p. 43.)

Unclean Hands. Petitioner on March 14, 1968 moved the District Court

> "* * * in the exercise of the inherent powers of this Court, to find and determine that defendants Lehman Brothers, Allan B. Hunter, Paul [illegible] Manheim, Paul M. Mazur and Francis C. Reed were and are in this Court with unclean hands and to direct that all further equitable relief be denied to such defendants in this action." (R.1561.)*

This curious prayer for relief was denied (R. 1938-40, Petition, pp. 45-6), and no appeal was taken from the denial.

The factual basis for the relief sought was said to be the Fund's purported failure to answer one interrogatory (R. 1562-68). The whole history of the matter is set forth at R. 1654-58. Briefly, however, what happened was this: petitioner served interrogatories requesting voluminous amounts of information from the Fund. The Fund ob-

* No equitable relief has been sought or obtained by any defendant in this action.

jected. The District Court sustained virtually all objections, but did direct the Fund to furnish to petitioner certain readily available tax returns. The Fund did just that. The fact that those tax returns did not answer his interrogatories was the basis for petitioner's motion.

ARGUMENT

POINT I

The Petition itself is good reason for denying certiorari.

Rule 23 [4] of this Court specifies that:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying his petition."

The Petition is plainly within the scope of this Rule.

POINT II

There are no considerations justifying certiorari.

Rule 19 [1](b) of this Court sets forth the character of reasons for granting certiorari. No such reason is present here.

No conflict between circuits exists.

No important state or territorial question has been decided.

No important question of federal law exists.

No federal question has been decided in conflict with any decision of this Court. Petitioner cites *S.E.C.* v. *Capital Gains Research Bureau*, 375 U.S. 180 (1963) as such a decision. It is not. There, this Court was

> "* * * called upon * * * to decide whether under the Investment Adviser's Act of 1940 the Securities and Exchange Commission may obtain an injunction compelling a registered investment adviser to disclose to his clients a practice of purchasing shares of a security for his own account shortly before recommending that security for a long-term investment and then immediately selling the shares at a profit upon the rise in the market price following the recommendation." (375 U.S. at 181).

Heretofore, the instant case has involved neither that statute nor that question.

There is no such departure from the usual course of judicial proceedings in this case as to justify intervention by this Court. Petitioner's claim that over the years

> "* * * the courts below have adopted towards petitioner an attitude of hostility, bias and prejudice which is reflected in their abuse of discretion and usurpation of judicial powers * * *" (Petition, p. 13)

is completely unsupported by the record.

Indeed, an examination of the record in this proceeding will show that both Court and opposing counsel have gone to great lengths to indulge petitioner in his bizarre conduct of this case, and that the District Court (particularly Judges Sugarman, Feinberg, Cooper, Murphy, Croake, Tyler, Herlands and Palmieri thereof) has bent over backwards to be scrupulously fair to petitioner.

POINT III

The decision below is clearly correct.

Petitioner-plaintiff's third application for equitable relief throwing the Fund into receivership was denied by the District Court because the showing in support thereof was "woefully insufficient" (R. 1904, Petition, p. 44). That was affirmed by the court below. It is axiomatic that drastic equitable relief should not be afforded on the basis of "woefully insufficient" showings. That the phrase was apt in the circumstances can hardly be questioned. See pp. 2-4, *supra*.

The District Court's refusal to permit petitioner to amend or supplement his complaint to assert a plethora of wholly new and unrelated matters was held unappealable by the Court below. Since Section 1291 of the Judicial Code permits only appeals of "final decisions" of district courts, and since several issues remain unresolved in this proceeding, that holding is clearly correct. (So was the District Court's exercise of discretion in the first instance; see pp. 4-5, *supra*.)

The District Court's refusal to declare that certain defendants were in court with unclean hands was never appealed and wasn't final. Moreover, the whole premise of petitioner's motion in this respect was absurd (see pp. 5-6, *supra*). The failure by the Court below to consider it was not in error.

Conclusion

For the reasons stated above, the Petition for a Writ of Certiorari herein should be denied in all respects.

Respectfully submitted,

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